Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BEISWENGER ENTERPRISES CORP.
Petitioner,

v.

KATHLEEN CARLETTA and ELNORA MYERS
AS THE PERSONAL REPRESENTATIVE OF THE
ESTATE OF GEORGE MYERS,
Respondent

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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74 pp

Question Presented

In *Lake Tankers Corp vs Henn,* 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957) this Court held that in a miltiple claimant limitation of liability case pursuant to 46 U.S.C. § 183 *et seq* the claimants may have a jury trial at common law outside the limitation of liability proceeding and may have the injunction under Rule F(3), Special Rules for Certain Maritime Cases, relaxed for that purpose *provided* all claimants enter into certain stipulations including a stipulation that they will not attempt to recover from the vessel owner more money than the limitation fund and a stipulation that they will not attempt to use the doctrine of *res judicata* upon returning to the admiralty court. The Court of Appeals for the Eleventh Circuit in this case allowed the relaxation of the injunction without either of these stipulations.

The question thereby presented is whether multiple claimants may proceed at common law with a jury trial outside of a properly filed limitation of liability case without making all of the stipulations required by this Court in the *Lake Tankers* case.

Names of All the Parties

The names of all the parties appear in the caption.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

BEISWENGER ENTERPRISES CORP.

Petitioner

v.

KATHLEEN CARLETTA and ELNORA MYERS,
as the Personal Representative of the
Estate of George Myers,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Reference to Opinions and Reports below

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 86 F.3d 1032, and is included in Appendix "A" beginning at p. 1a. The opinion and order of the United States District Court for the Middle

District of Florida begins at Appendix "B", p. 31a and the report and recommendation of the Magistrate Judge begins at p. 36a of Appendix "C." There are no unofficial reports of opinions or orders of the District Court or the Magistrate Judge.

Grounds for Jurisdiction in this Court

The opinion and judgment sought to be reviewed was entered in the Court of Appeals for the Eleventh Circuit on the 27th day of June, 1996. A timely filed Motion for Rehearing and Suggestion of Rehearing *en banc* was filed on the 17th day of July, 1996, and overruled on the 8th day of January, 1997, (Appendix "D", p. 44a). This Petition For Certiorari was filed in this Court on or before the 8th day of April, 1997, to perfect this Court's jurisdiction under 28 U.S.C. § 2101(c).

Statutes and Rules of Procedure Involved

46 U.S.C. § 183

(a) The liability of the owner of any vessel, whether American of foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of

the interest of such owner in such vessel, and her freight then pending.

(b) Not applicable.

46 U.S.C. § 185

The vessel owner within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of the claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirement of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Supplemental Rules for Certain Admiralty and Maritime Claims

Rule F: Limitation of Liability

(3) **Claims Against Owner; Injunction.** Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

Statement of the Case

The record in this case in the District Court for the Middle District of Florida will show that the corporate owner of the M/V SKYRIDER filed a timely petition for limitation of or exonoration from liability arising out of a marine casualty occurring in coastal waters of Florida. Claims were filed in behalf of Kathleen Carletta for bodily injuries and by Elnora Myers, personal representative, for the death of George Myers. All normal procedures were followed, and the case was called for a pre-trial conference pursuant to a trial setting before a visiting judge. At this pre-trial conference, the Claimants presented a motion to lift the Rule F(3) injunction in order to allow them to add the Plaintiff-owner as a party in a then pending suit against other parties in the Circuit Court of Pinellas County, Florida, and to stay the limitation of liability case in the District Court until that state court case is finally determined. The Magistrate Judge before whom the case was pending wrote a report recommending the motion be

denied without prejudice, but based the recommendation on invalid reasoning relating to the form of the stipulations which accompanied the motion. (Appendix "C", P. 36a). Claimants appealed to the District Court and amended their stipulations. The amended stipulations still did not meet the requirements made by this Court in *Lake Tankers Corp. vs Henn,* 354 US 147, 77 S.Ct. 1269, 1 L.Ed.2d. 1246 (1957) but the District Court granted the motion and stayed the limitation of liability proceeding anyway pending a determination of liability and damage issues in the state court where the claimants were pursuing a jury trial. (Appendix "B", p. 31a).

Plaintiff-owner appealed the order lifting the injunction to the the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1292(a)(1). The jurisdiction of the District Court in the first instance was exclusive of the jurisdiction of any other court. *Just vs Chambers,* 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941).

The Court of Appeals acknowledged that the decision of this Court in *Lake Tankers vs Henn, supra,* is controlling, but reasoned that the stipulations made by the claimants were sufficient to avoid the need for a concursus in the limitaton of liability case. Therefore it would allow the multiple claimants to proceed in a common law court to establish liability and damages in a jury trial and then return to the admiralty court to try contested issues of privity and knowledge.

Plaintiff-owner contended that *Lake Tankers vs Henn* established that the stipulations must protect the vessel

owner's right to limitation of liability. The Claimants argued, and the Court of Appeals held, that the stipulations are sufficient if they protect the Petitioner's right to *claim* limitation of liability. The stipulation was that Claimants will not *attempt to collect* any judgment in the state court *until* the District Court, exercising its exclusive admiralty jurisdiction, has determined whether Plaintiff-owner is entitled to limitation of liability. See Stipulations 3 and 4, p. 9a. Although the stipulations in form state they will not claim *res judicata* as to any issue decided in the state court as to limitation of liability, the stipulation relating to collection of the state court judgment shows clearly they do intend to rely on the doctrine of *res judicata* with respect to liability, for it is only privity and knowledge of the acts which establish liability that will defeat the right to limitation of liability. Thus, the only issue presented to the Court of Appeals, and to this Court is whether the stipulations conform to the requirements of this Court. The two stipulations which Petitioner urges to be insufficient under the *Lake Tankers* decision are those two referenced above.

Reasons for Allowing the Writ

The writ should be allowed for four separate and distinct reasons:

POINT I: THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *LAKE TANKERS CORP. VS HENN.*

It has been held in this Court that where a Court of Appeals accepts that a decision of this Court is controlling,

but reaches a different result from that required by that decision, certiorari will lie. In *Egan vs City of Aurora,* 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961), certiorari was granted and the case was remanded sumarily. Petitioner suggests this would be an appropriate procedure here, as all the issues presented have been determined in the *Lake Tankers* case and the court of appeals decisions in other circuits which have dealt with the issue following that decision have given those issues the same interpretation. It would seem from the cases that the failure of a court of appeals to follow a decision of this Court has been treated as grounds for certiorari in that it demonstates the need for this Court's supervision. *Wilson vs Schnettler,* 365 U.S. 381, 81 S.Ct. 632, 5 L.Ed.2d. 620 (1961); *reh. den.* 365 U.S. 890, 81 S.Ct. 1025, 6 L.Ed. 200; *Wilkinson vs U. S.,* 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d. 633 (1961); *reh. den.* 365 U.S. 890, 81 S.Ct. 1024, 6 L.Ed. 200; *Williams vs State of Georgia,* 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed 1161 (1955), indicate this same treatment is in order. Since the controlling decision in this Court has been followed in several other courts of appeals, the subject of conflict with a decision of this Court will be combined with the discussion of conflict with other courts of appeals in Point II below.

POINT II: THE DECISION OF THE COURT OF APPEALS IS NOT ONLY IN CONFLICT WITH A CONTROLLING DECISION IN THIS COURT BUT ALSO CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH HAVE FOLLOWED THE DECISION OF THIS COURT.

(A) THE CONFLICT WITH THE DECISION IN THIS COURT:

It is important to revisit the facts of *Lake Tankers Corp. vs Henn,* 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d. 1246 (1957). There were multiple claimants from a collision in the Hudson River. Following the filing of several suits in state courts, Lake Tankers Corp. filed a limitation of liability action and posted security in a proper amount. The common law suits as filed claimed a total amount of money which was in excess of the limitation fund, but when those same claimants filed their claims in the admiralty action, they had reduced their claims to a total amount which was less than the fund. All claimants then "(R)elinquished all right to any damage in excess of the amounts set forth in their respective claims...and expressly limited their recovery to those amounts." 354 U.S. 149. The principal claimant then stipulated she would not increase her claim and that she would not claim any issue ruled upon by the state court relating to limitation of liability was *res judicata.* The district court then vacated the restraining order (Rule F(3) injunction) *"(S)ince the total fund exceeded the amount of the claims."* 354 U.S. 149, 150 (Emphasis added).

Until that time it was accepted by admiralty practioners that under *Langness vs Green,* 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and *Ex Parte Green,* 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed 1212 (1932) a single claimant in a limitation of liability case is entitled to a stay and a jury trial in a common law court without prejudice to the exclusive jurisdiction of the admiralty court to determine all issues of limitation of liability. But where there were multiple

claimants, there was a need for a concursus, and all issues were within the exclusive jurisdiction of the admiralty court. *Lake Tankers* departed from that accepted principle. Until the case at bar was decided, the reasons for that departure were reasonably clear. Now, it seems appropriate to examine those reasons, because the decision below is contrary to all of them and destroys that which this Court expressly preserved. In fact, this Court decided *British Transport Commission vs United States,* 354 U.S. 129, 77 S.Ct. 1103, 1 L.Ed.2d. 1234 (1957), on the same day as *Lake Tankers* was decided and referred to that decision when writing in *Lake Tankers* as follows:

> "It is, therefore, crystal clear that the operation of the (Limitation of Liability) Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight." 354 U.S. 151.

The opinion of this Court continues by pointing out at 354 U.S. 152 that where there is more than one claimant a concursus is necessary because the owner can suffer no more than the amount of the fund in any event. This Court continues:

> "On the other hand, where...the fund...*exceeds the claims made against it, there is no necessity for the maintenance of the concourse*.... (B)ut here...it follows indubitably that *the fund is sufficient to pay all claims in full."* 354 U.S. 152 (Emphasis added).

This decision continues and concludes by saying that "*...(S)o long as his claim of limited liability is not jeopardized,*" (Emphasis addded) the vessel owner may be subject to a lifting of the Rule F(3) injunction. 354 U.S. 153.

The simplicity of the wording and reasoning of this Court's opinion in *Lake Tankers* should leave no doubt that it was the stipulation that the fund was adequate to pay all claims in full that justified the departure from the rule that multiple claimants require the exercise of the admiralty court's exclusive jurisdiction. Following *Lake Tankers,* the admiralty practioner began to refer to the multiple claimant case as the "Multiple-claimant-inadequate- fund," case. This is such a case.

(B) THE CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The opinion of the Court of Appeals states plainly that it establishes a new rule for application in the Eleventh Circuit under which the exclusive jurisdiction of a district court sitting in admiralty may be abrogated in a multiple-claimant-inadequate-fund limitation of liability case without requiring all claimants to stipulate the adequacy of the limitation fund to to pay all claims in full. (Appendix "A", pp. 9a and 17a). It should be noted that this issue is jurisdictional. In *Lake Tankers Corp vs Henn, supra,* 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d. 1246 (1957). This Court stated at 354 U.S. 150 that, "We granted certiorari to pass upon the important jurisdictional question presented." In comparing this decision with that of the Court of Appeals for the Seventh Circuit in *Complaint of McCarthy Bros.*

Company/Clark Bridge, 83 F.3d. 821 (7th Cir., 1996) we see that these stipulations are so important to jurisdiction that where proper stipulations are not made, the admiralty court has exclusive jurisdiction, but where proper stipulations are made, the admiralty court has no jurisdiction and *must* surrender jurisdiction to the common law court. And see the explanation of the jurisdictional issue given in *Gorman vs Cerasia,* 2 F.3d. 519 (3rd Cir., 1993).

In addition to the *Lake Tankers* case, the Court of Appeals relies upon decisions of the Second, Third, Fifth, Sixth, and Eighth Circuits to justify the rule it devises for the Eleventh Circuit. The cases cited are unanimous in their decisions and/or assumptions that regardless of the form or substance of any other stipulations required in a given case, the claimants must stipulate that the vessel owner's ultimate liabillity will not in any event exceed the fund. Otherwise, the admiralty court must retain and exercise its exclusive jurisdiction. The cases cited and the reasons they are in conflict with or do not support the decision below are as follows:

(1) In *Gorman vs Cerasia, supra,* 2 F.3d. 519 (3rd Cir., 1993), the stipulation was not set forth in the opinion, so it cannot be said what the court did or did not approve in that respect. However, it did discuss the possibility that in a common law action the vessel owner's limited liability could be exceeded by direct liability to a plaintiff, and a joint tort feasor's right to contribution could then cause the vessel owner's liability to exceed the limitation fund. As noted above, the Court concluded the issue is jurisdictional, and "Unless the third parties executed appropriate stipulation

preserving...(The vessel owner's) right to limitation," the admiralty court is bound to retain and exercise its exclusive jurisdiction. See particularly note 8, p. 527. Clearly, it was the opinion of the Court of Appeals for the Third Circuit that the stipulations must preclude any potential excess liability of the vessel owner before the admiralty court may relinquish its jurisdiction to a common law court.

The difficulty in reading this opiniion stems in some part from the fact that it deals with an owner operated pleasure craft in a collision case—a problem which has never been before this Court. Clearly, if an owner is the operator of a vessel at the time of a collision, and negligent operation of the vessel is alleged, the owner, if liable, will be denied limitation of liability because of his own negligence. Does this preclude his right to *claim* limitation of liability? In *The M/V SUNSHINE II,* 808 F.2d. 762 (11th Cir., 1987) the court upheld a district court order following *Fecht vs Makowski,* 406 F.2d. 721 (5th Cir., 1969) holding such owner does not have the right even to maintain the action. *Gorman vs Cerasia* seems to be concerned equally with this problem but unwilling to go that far when some of the individual procedural aspects of the case are considered. However, the court does seem to acknowledge that *where a proper limitation of liability case* is to be allowed to go forward in a common law court it must be under stipulations which preclude any contingent liability of the owner above the limitation fund.

(2) *Magnolia Marine Transport Co. vs La Place Towing Corp.,* 964 F.2d. 1571 (5th Cir., 1992) is not a limitation of liability case. It was a declaratory judgment

action. It holds properly that underwriters at interest with a vessel owner have no standing to bring an action or receive direct benefit from the limitation of liability statutes. Even there, however, the court stated that:

> "Multiple claimants may reduce their claims to the equivalent of single claim by agreeing and stipulating as to the proirity in which the claimants will receive satisfaction against the shipowner *from the limited fund.*" (Emphasis added) 964 F.2d 1571, 1576. And see Footnote 1.

The claimants in that case did in fact stipulate that the aggregate of their claims would not subject the vessel owner to liability in excess of the fund. It appears that the claimants as well as the court recognized this requirement.

(3) *Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B. V.*, 836 F.2d 750 (2nd Cir., 1988) was the first case in which priorities between and among claimants arose. That requirement in that case, however, was in addition to rather than instead of the stipulation that the fund is adequate to cover all claims in full. In fact in that case the Court of Appeals for the Second Circuit held that the stipulation originally filed was deficient because it stated the claimants would not expose the vessel owner to liability in excess of the limitation fund *"(I)n the state court action."* (Emphasis by the court). With leave of court the stipulation was amended to meet the requirement. Of the amendment the court stated:

> "We believe that this amendment is significant in that it embodies the claimants' intention that the shipowners *shall not, in any set of circumstances,* be exposed to liability in excess of the limitation fund." 836 F.2d. 750, 759 (Emphasis added).

Certainly the Second Circuit was in accord. It was that Court's decision *en banc* which this Court affirmed in *Lake Tankers Corp. vs Henn* in the first place.

(4) *S & E Shipping Corp. vs Chesapeake and Ohio Ry. Co.,* 678 F.2d. 636 (6th Cir., 1982) put the whole question and answer in three sentences:

> "The district court, however, *must* dissolve a stay of proceedings and permit claimants to litigate their claims in alternative forums in two circumstances. First, *if the limitation fund exceeds the aggregate all claims,* claimants must be permitted to proceed in other forums....Where the limitation fund is sufficient to pay all potential claims, however, a concursus is unnecessary because the claimants need not compete among themselves for a larger portion of a limited fund." 678 F.2d 636,643 (Emphasis added).

This court had no problem with the proposition that the stipulations must guarantee that the limitation provided by the fund will be the limit of the vessel owner's potential liability.

(5) In *Universal Towing Co. vs Barrale,* 595 F.2d 414 (8th Cir., 1979) the Court of Appeals for the Eighth Circuit showed a complete understsanding of the requirements of the stipulations in the following passage:

> "In two kinds of limitation cases, the federal courts have permitted claimants to pursue their remedies in a forum of their own chosing. *The first situation exists if the limitation fund exceeds the total of all claims. (Citing authority).* (This) prevents claimants from securing judgments in various courts that, in the aggregate, exceed the fund and, *thus, asures the owner that he will not be required to pay damages in excess of the statutory limits.*" 595 F.2d. 414, 418 (Emphasis added).

Thus we see that all of the authorities cited by the Court of Appeals either hold or assume the law to be the opposite of the rule laid down in this case for the Eleventh Circuit. If they are not clear and unambiguous on this point, then clarification of the law rather than supervisory jurisdiction is indicated.

POINT III: THE DECISION CONFLICTS WITH PRIOR DECISIONS IN THE ELEVENTH CIRCUIT THAT ISSUES OF PRIVITY AND KNOWLEDGE MUST BE TRIED BY THE SAME COURT WHICH TRIES NEGLIGENCE ISSUES.

It is clear from the record that the Claimants as well as the lower courts in this case envision that issues of negligence, proximate cause and damages will be tried to a jury in the state court action, and if liability be determined in excess of the limitation fund, the case will return to admiralty for a determination of privity and knowledge issues with the result that if the admiralty court find privity and knowledge, the judgment of the state court in excess of the limitation fund will stand. The stipulation is that the Claimants will not attempt to collect any state court judgment "Until" the admiralty court has determined the limitation of liability issues. (Appendix "A", p. 9a, No. 4). This demonstrates clearly that claimants intend to rely on *res judicata* in the state court to establish liability in the admiralty court.

The Court of Appeals correctly held that in order to allow multiple claimants to try their cases in common law courts, they must make stipulations which avoid the need for a concursus. The mistake made was in determining what is necessary to avoid a concursus. We do not attempt to define fully a concursus here, but it includes a determination of whether the vessel owner is liable to each claimant, and privity and knowledge of the owner as to each instance of neglegence found. It is necessary, therefore, that the trier of the facts on the negligence issues be the same trier of facts on issues relating to privity and knowledge. In *American*

Dredging Co. vs Lambert, 81 F.3d 127 (11th Cir., 1996) the Court affirmed its own prior decision (in the old Fifth Circuit) in *Tittle vs Aldacosta,* 544 F.2d 752, (5th Cir.,1977) that where privity and knowledge issues must be decided, they must be decided in the same court in which the negligence issues are decided in a two part process. Negligence and privity and knowledge are not separate issues. The decision in this case is in conflict with those decisions on the ultimate issue of what issues have to be tried in the admiralty court and why.

POINT IV: THE DECISION OF THE COURT OF APPEALS, IF ALLOWED TO STAND, WILL DEPRIVE VESSEL OWNERS IN MOBILE, ALABAMA, TAMPA, FLORIDA, SAVANNAH, GEORGIA, AND OTHER IMPORTANT PORTS OF THE SOUTHEASTERN UNITED STATES OF THEIR STATUTORY RIGHTS UNDER THE LIMITATION OF LIABILITY RULES AND STATUTES WHICH ARE AVAILABLE TO VESSEL OWNERS IN OTHER JURISDICTIONS OF THE UNITED STATES.

The rule for the Eleventh Circuit which the opinion below establishes allows the claimants in any limitation of liability case to avoid a concursus and a trial in the exclusive jurisdiction of the admiralty court by simply joining together to stipulate that they will not attempt to collect a judgment of a common law court until after the admiralty court has determined whether the vessel owner can limit his liability *as found in another court by a jury.* There is not even any requirement that the stipulations they make be true or that they be founded in correct legal principals. In this case, there

is a stipulation filed under the guidance of lawyers representing both claimants that one of these claimants shall have a priority over the other one, but there is no legal reason why that should be true. It was perceived by the courts below to be required in order to avoid the necessity for a concursus. In every case, it would be possible for multiple claimants to make stipulations which would not be at all harmful to themselves but would meet this Eleventh Circuit rule avoiding a concursus and thereby securing jury trials of liability and damage issues before the admiralty court could exercise any jurisdiction whatsoever. This is certainly incompatible with the notion that all issues relating to limitation of liability are within the exclusive jurisdiction of the federal district courts. Special Admiralty Rule F(3) is rendered meaningless.

Prior to this Court's decision in *Lake Tankers,* it was held in the old Fifth Circuit that an order lifting a statutory injunction in a limitation of liability case was not appealable. However, it was on just such an appeal that *Lake Tankers* was decided. That issue was not discussed in this Court, but in *Pershing Auto Rentals, Inc., vs Gaffney,* 279 F.2d 546 (5th Cir., 1960) the Fifth Circuit accepted *Lake Tankers* as having overruled that earlier rejection of jurisdiction of such an appeal. In commenting on the other effect of *Lake Tankers,* and without citing the case for this point, the late John R. Brown, a noted admiralty practitioner before assuming the bench, writing for a unanimous court, spoke the following:

> "If an admiralty court in a multiple-claims-inadequate-fund case may permit the claimants first to try the issue of liability vel non and damages in every claim in court

> actions outside the limitation proceeding during which time the limitation case will be in a suspensive state of limbo, there will be little, if anything, left of the statutory scheme created by Congress and implemented by Admiralty Rules contemplated in the statute. Because this is about all that is left now. No longer the occasion for lamentations, *Langness vs Green,* note 8, *supra,* permits the claimant in a *single claim situation* after appropriate protective stipulations to proceed elsewhere reserving exclusive final determination of the right to limitation (and amount of the fund) to the admiralty court. Likewise, *in multiple-claim situation where the total of all the claims does not exceed the limitation fund,* any or all of the claimants may under suitable stipulation litigate elsewhere. *All that is left, then, is the case of multiple claims which exceed the limitation fund and in which the right to limit is disputed.*" 279 F.2d 549-550 (Emphasis added).

This decision in the United States Court of Appeals for the Eleventh Circuit takes away all that is left of the limitation of liability statutes and rules adopted by this Court to implement the statutes, at least in that circuit. There does not seem to be the problem in any other circuit, and no reason appears why vessel owners in the Eleventh Circuit should not enjoy the same statutory rights as their counterparts and competitors in the other geographical jurisdictions of the United States. This case presents the classic example of the wisdom of our

forefathers in reserving all matters of admiralty and maritime jurisdiction to the courts of the United States. We have a peculiar need for uniformity in maritime affairs. This case needs this Court's supervisory intervention to preserve this uniformity in this instance.

Conclusion

For these reasons, Petitioner respectfully prays that this Court will grant this Application for Writ of Certiorari and that Petitioner will be given further opportunity to brief and argue the issues raised herein.

Respectfully submitted,

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APPENDIX A

In the Matter of Petition of BEISWENGER ENTERPRISES CORP.,
Plaintiff-Appellant,

v.

Kathleen CARLETTA, Pauline Walls, Shante Myers, Yolanda Williams, Julian Myers, Estate of George Myers, George E. Myers, Jr., Claimants-Appellees.

No. 95-2272.

United States Court of Appeals,
Eleventh Circuit.

June 27, 1996.

Owner of vessel employed in parasailing business brought admiralty action under the Limitation of Vessel Owner's Liability Act, seeking exoneration from or limitation of liability with respect to claims arising out of parasailing accident which killed one parasailor and injured another. Damage claimants filed motion to stay limitation action and lift injunction against their state court tort action. The United States District Court for the Middle District of Florida, No. 91-149-CIV-T-17C, Elizabeth A. Kovachevich, Chief Judge, granted motion, and vessel owner appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) damage claimants in a multiple-claims-inadequate-fund case may proceed against vessel owner outside limitations proceeding upon filing of appropriate protective stipulations; (2) for purposes of determining adequacy of stipulations in instant case, wrongful death claim asserted by personal representative

was a single claim, notwithstanding existence of minor children, since claim can only be brought by personal representative; (3) to determine whether a multiple-claims-inadequate-fund situation exists in limitations proceeding, potential claims for indemnity or contribution against vessel owner by joint tort-feasors must be separately considered: (4) stipulation by claimants that they would not seek to enforce any judgement in state court, whether against shipowner or third party entitled to seek indemnity or contribution from shipowner, that would expose shipowner to liability in excess of limitation fund, until shipowners' right to limitation was adjudicated in admiralty court, was sufficient to convert case into functional equivalent of single claim case; and (5) remand was necessary to amend stipulations to fully protect vessel owner's rights under the Limitation Act.

Vacated and remanded.

1. Shipping ♦♦209 (1.1)

Federal courts have exclusive admiralty jurisdiction to determine whether vessel owner is entitled to limited liability under the Limitation of Vessel Owner's Liability Act. 46 App. U.S.C.A. § 181 et seq.

2. Admiralty ♦♦80

In limitation of liability proceedings, as in all admiralty cases, there is no right to a jury trial. 46 App. U.S.C.A. § 181 et seq.

3. Shipping ♦♦209 (1.6)

Damage claimants in limitation of liability proceeding in which there are multiple claims, but an inadequate fund, may

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proceed against vessel owner outside admiralty court upon filing of appropriate protective stipulations which create functional equivalent of a single claim situation; procedure protects vessel owner's rights under Limitation of Vessel Owner's Liability Act, while allowing damage claimants to pursue common-law remedies, a result consistent with mandate of savings to suitors clause. 28 U.S.C.A. § 1333(1); 46 App.U.S.C.A. § 181 et seq.

4. Shipping ♦♦209(1.6)

Potential for claims for attorney fees or costs against a shipowner by claimant or a third party creates a multiple claimant situation in limitation of liability proceeding, necessitating a concursus. 46 App.U.S.C.A. § 181 et seq.

5. Shipping ♦♦209(1)

Wrongful death claim brought by personal representative constituted single claim for purposes of determining whether stipulation of damage claimants in limitation of liability proceeding adequately protected shipowners' rights under the Limitation of Vessel Owner's Liability Act. and existence of minor children of decedent did not transform single claim into multiple claims; whether issue was decided under general maritime law, Florida law, or New York law, there was only a single claim arising from the death which belonged to personal representative of estate, and beneficiaries of estate had to share in single judgement, if any, obtained by personal representative. West's F.S.A. § 768.20; N.Y. McKinney's EPTL 5-4.1; 46 App.U.S.C.A. § 181 et seq.

6. Shipping ♦♦209(1)

To determine whether multiple-claims-inadequate-fund situation exists in limitation of liability proceeding, potential claims for indemnity of contribution against shipowner by joint tort-feasors must be separately considered; possibility of such claims creates multiple claims situation. 46 App. U.S.C.A. § 181 et seq.

7. Shipping ♦♦209(1.6)

It is not necessary that third parties who might have contribution or indemnity claims against shipowner sign protective stipulation in order for injured claimants to proceed outside of limitation action; rather, shipowner can be protected from excess liability at hands of third parties if claimants stipulate that they will not enforce any excess judgement or recovery as would expose vessel owner to liability in excess of limitation fund. 46 App. U.S.C.A. § 181 et seq.

8. Shipping ♦♦209(1.6)

Stipulation by damage claimants in limitation of liability proceeding that they would not seek to enforce any judgement in state court, whether against shipowner or third party entitled to seek indemnity or contribution from shipowner, that would expose shipowner to liability in excess of limitation fund, until shipowners' right to limitation was adjudicated in admiralty curt, was sufficient to convert case into functional equivalent of single claim case. 46 App.U.S.C.A. § 181 et seq.

9. Shipping ♦♦209(1.6)

Protective stipulations by damage claimants seeking to proceed outside limitation liability proceeding must protect vessel owner's right to litigate its claim to limited liability exclusively in admiralty court; thus, damage claimants must agree not only to waive res judicata as defense arising from state court decision, but must also waive related defense of issue preclusion with respect to all matters reserved exclusively for determination by admiralty court. 46 App. U.S.C.A. § 181 et seq.

10. Shipping ♦♦209(1.6)

Protective stipulations by damage claimant seeking to proceed outside limitation of liability proceeding must protect vessel owner from having to pay damages in excess of limitation fund, unless and until admiralty court denies limited liability. 46 App. U.S.C.A. § 181 et seq.

11. Shipping ♦♦209(106)
Protective stipulations by damage claimants seeking to proceed outside limitation of liability proceeding must protect vessel owner from litigation by claimants in any forum outside limitation proceeding. 46 App. U.S.C.A. § 181 et seq.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Appellant Beiswenger Enterprises Corporation ("BEC"), the owner of the M/V "Skyrider Express," brought this admiralty action under the Limitation of Vessel Owner's Liability Act, 46 App. U.S.C. § 181 *et seq.* (the "Limitation Act"). This statute, originally enacted by Congress in 1851, limits a vessel owner's liability for any damages arising from a maritime accident to the value of the vessel and its freight, provided that the accident occurred without such owner's "privity or knowledge." 46 App.U.S.C. § 183(a)[1] When BEC filed its petition seeking limited liability, the district court enjoined the institution or

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1. 46 App.U.S.C. § 183(a) provides:

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

prosecution of other suits against BEC pending the outcome of the limitation proceeding. *See* Fed.R.Civ.P. Supplemental Rule F(3). The damage claimants, appellees herein, filed a motion in the district court to stay BEC's limitation action and to lift the injunction against their state court tort action. The district court granted the damage claimants' motion, after accepting certain stipulations from the damage claimants designed to protect the vessel owner's rights under the Limitation Act. BEC appeals, contending that the amended stipulations filed by the damage claimants are inadequate. In this opinion, we address two primary issues. First, we address the viability in this Circuit of the procedure which allows the damage claimants in a multiple-claims-inadequate-fund case to proceed against the vessel owner outside the admiralty court upon the filing of appropriate protective stipulations. Second, we address whether the amended stipulations filed by the damage claimants in this case adequately protect BEC's rights under the Limitation Act.

I.

On December 4, 1990, George Edward Myers and his fiancee Kathleen Carletta hired BEC to take them parasailing near Clearwater Beach, Florida. Parasailing is a recreational boating activity in which the riders, secured to the boat by a tow line, are pulled aloft by a parachute. Myers and Carletta boarded BEC's motor vessel, the "Skyrider Express, and they proceeded into the Gulf of Mexico. A the Skyrider Express maneuvered through the water, the parachute canopy filled with wind, lifting Myers and Carletta into the air. At the conclusion of the ride, weather conditions interfered with the boat operator's efforts to retrieve the parasailors from the air. The operator severed the tow line connecting the vessel to the riders, causing them to descend to the water. After Myers and Carletta splashed down, the parachute canopy again filled with a gust of wind and rose into the air. Somehow, the tow line had become entangled around

one of Myers' ankles, causing the parachute to pull him, hanging upside down, toward the sky. As the parachute passed over land, Myers slammed into several shore-side objects, and sustained serious injuries from which he died fourteen days later.

Anticipating liability for this event, BEC brought this action on February 6, 1991, seeking exoneration from or limitation of liability with respect to any claims arising out of the parasailing incident. BEC asserted that it was not at fault for the accident, and that the accident occurred without its privity or knowledge. On March 15, 1991, the district court approved BEC's security bond and *ad interim* stipulation of $40,090.00 as the value of the M/V Skyrider Express and its freight, and enjoined the institution or further prosecution of any suits against BEC or the M/V Skyrider Express in any other forum. *See generally* 46 App.U.S.C. § 185; Fed.R.Civ.P. Supplemental Rule F. The district court also issued a published notice directing all potential claimants to file their claims in the admiralty court by April 15, 1991.

On April 12, 1991, Carletta filed a claim for damages for her personal injuries, and, in an answer to BEC's limitation complaint, disputed BEC's allegations on the central issues of fault and privity or knowledge. The estate of Myers and two of Myers' surviving minor children, Shante Denise Myers and Julian Caesar Myers, also answered BEC's complaint and filed a damages claim.[2]

More than a year later, in July 1992, Carletta and Myers' estate filed an action for personal injury and wrongful death in Florida state court against the following parties: Parasailing

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2. Myers was also survived by two other minor children: George Edward Myers, Jr. and Tiffany E.M. Carter (who was later renamed Tiffany Myers). These children, through their guardians, eventually joined the limitation action and adopted all the pleadings of the estate.

Enterprises, Inc. and Controlled Parasailing Corporation of America, the manufacturer and seller of the parasailing equipment; Mark McCulloh, an employee of Parasailing Enterprises and/or Controlled Parasailing; Roy F. Beiswenger, the operator of the Skyrider Express at the time of the accident; and William J. Beiswenger, the parasailing instructor and trainer. Because this state court complaint did not name BEC as a party, the district court refused to enjoin its prosecution.[3]

At some point, appellees decided that they wanted to add BEC as a party to the pending state court action. On September 14, 1994, they filed a motion to stay the limitation of Liability proceeding and to lift the injunction against suing BEC in state court. Appellees attached to this motion a series of stipulations designed to protect BEC's rights under the Limitation Act. The magistrate judge identified several perceived deficiencies in these stipulations, and recommended that the motion to lift the injunction be denied without prejudice. In response to the magistrate judge's concern, appellees filed the following amended stipulations on October 6, 1994:

AMENDED STIPULATIONS OF THE RESPONDENT/ CLAIMANTS IN SUPPORT OF MOTION TO STAY LIMITATION OF LIABILITY ACTION AND TO LIFT INJUNCTION RESTRAINING ACTIONS AGAINST PETITIONERS

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3. According to BEC, William J. Beiswenger is the sole officer and shareholder of BEC. In the district court, BEC argued that by naming William J. Beiswenger as a party to the state court action, the damage claimants effectively violated the injunction restraining the institution of suits against BEC. See *Flink v. Paladini*, 279 U.S. 59, 62-63, 49 S.Ct. 255, 255, 73 L.Ed. 613 (1929) (holding that the stockholders of a corporation owning a vessel are entitled to invoke the Limitation Act). The district court rejected BEC's arguments without explanation, thus allowing the state court suit against William J. Beiswenger to proceed. BEC has not appealed from the district court's orders allowing William J. Beiswenger to be sued, and we do not address that issue.

Provided the Court lifts its Injunction of March 15, 1991 and stays this action to permit the Claimants to proceed against the Petitioner in a state court action for personal injury and wrongful death, the Respondent/Claimants, KATHLEEN CARLETTA and ELNORA MYERS, as Personal Representative of the Estate of George Edward Myers, stipulate and agree as follows:

1. That the Petitioner, BEISWENGER ENTERPRISES CORP., has the right to litigate the issue of whether it is entitled to limit its liability under the provisions of the Limitation of Liability Act, 46 U.S.C. § 181 et seq., in this Court, and this Court has exclusive jurisdiction to determine that issue.

2. That the Petitioner has the right to have this Court determine the value of the M/V Skyrider Express immediately following the incident at issue, and this Court has exclusive jurisdiction to determine that issue.

3. That the Respondent/Claimants will not seek a determination of the issues set forth in paragraphs (1) and (2) above in any state court, and consent to waive any res judicata effect the decisions, rulings or judgments of any state court might have on those issue.

4. That the Respondent/Claimants will not seek to enforce any judgement rendered in any state court, whether against the Petitioner or another person or entity that would be entitled to seek indemnity or contribution from the Petitioner, by way of cross-claim or otherwise, that would expose the Petition [sic] to liability in excess of $40,090.00 until such time as this Court has adjudicated the Petitioner's right to limit that liability.

5. That, in the event this Court determines that the Petitioner is entitled to limit its liability, the Respondent/Claimants agree that any claim based upon fees and/or costs awarded against Petitioner and in favor of any party in any state court proceeding

will have first priority against the available fund.

6. That, in the event this Court determines that the Petitioner is entitled to limit its liability, the Respondents/Claimants agree that, following payment of the claims, if any, described in paragraph 5 above, the claim of ELNORA MYERS, as personal Representative of the Estate of George Edward Myers, Deceased, shall have second priority against the limitation fund and priority over the claim of KATHLEEN CARLETTA.

R-2-81.

After reviewing these amended stipulations, the district court stayed the federal limitation proceeding and lifted the injunction, thus allowing appellees to proceed against BEC in state court. This appeal followed.

II.

In the mid-nineteenth century, Congress passed the Limitation Act[4] "to encourage ship building and to induce capitalists to invest money in this branch of industry." *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 121, 20 L.Ed. 585, 591 (1871). The Act achieves this purpose by "exempting innocent shipowners from liability, beyond the amount of their interest." *Id.* When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking protection under the Limitation Act. Provided that the accident in question occurred without the vessel owner's "privity or knowledge," the Act limits the owner's liability to the value of his or her interest in the vessel and its pending freight. 46 App. U.S.C. § 183(a). After the vessel owner deposits with the court an

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4. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (codified as amended at 46 App.U.S.C. §§ 181-189;).

amount representing the value of the vessel and its freight ("limitation fund"), the district court stays all related claims against the vessel owner pending in any other forum, and directs all potential claimants to file their claims against the vessel owner in the district court within a specified period of time. 46 App.U.S.C. § 185; Fed.R.Civ.P. Supplemental Rules F(3), F(4); *see In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir.1988); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979).

When the damage claims have been filed, the district court proceeds to resolve the vessel owner's claim to limited liability. *See Dammers*, 836 F.2d at 755. In a typical limitation proceeding, the court undertakes the following two-step analysis. "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." *Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1563-64 (11th Cir.1985) (quoting *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir.1976). The damage claimants bear the initial burden of establishing liability, and the shipowner then bears the burden of establishing the lack of privity or knowledge. *Id.* If the vessel owner is found liable, but limitation is granted, the admiralty court distributes the limitation fund among the damage claimants in an equitable proceeding known as a concursus. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 643 (6th Cir.1982) ("The purpose of the *concursus*, the proceeding before the admiralty court in which all competing claims must be litigated, is to provide for a marshalling of assets and for a setting of priorities among claims where the asserted claims exceed the value of the vessel and its freight."); *In re Moran Transp. Corp.*, 185 F.2d 386, 389 (2nd Cir.1950) ("[T]he purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equi-

table fashion, to provide a marshalling of assets—the distribution pro rata among claimants, none of whom can be paid in full."), *cert. denied,* 340 U.S. 953, 71 S.Ct. 573, 95 L.Ed. 687 (1951).

[1,2] Federal courts have exclusive admiralty jurisdiction to determine whether the vessel owner is entitled to limited liability. *See Ex Parte Green,* 286 U.S. 437, 439-40, 52 S.Ct. 602, 603, 76 L.Ed. 1212 (1932) (holding that the admiralty court's jurisdiction over issues bearing on the right to limited liability, such as "privity or knowledge," is exclusive); *Langnes v. Green,* 282 U.S. 531, 539-40, 51 S.Ct. 243, 246, 75 L.Ed. 520 (1931) (same); *In re Wood,* 230 F.2d 197, 199 (2d Cir.1956) ("[T]he issue of the owner's privity or knowledge must be litigated in the admiralty court, which has exclusive jurisdiction over that issue."). In limitation proceedings, as in all admiralty cases, there is no right to a jury trial. *See Waring v. Clarke,* 46 U.S. (5 How.) 441, 459, 12 L.Ed. 226, 235 (1847) (holding that the Seventh Amendment does not provide for jury trials in admiralty cases); *Newton v Shipman,* 718 F.2d 959, 962 (9th Cir.1983) (per curiam) (explaining that there is no right to jury trial in a limitation action).

However, the same statute that grants the federal courts exclusive admiralty and maritime jurisdiction saves to suitors "all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). This "saving to suitors" clause of § 1333 embodies a presumption in favor of jury trials and common law remedies in the forum of the claimant's choice. *See Odeco Oil & Gas Co., Drilling Div. v. Bonnette,* 74 F.3d 671, 674 (5th Cir.1996); *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,* 836 F.2d 750, 754 (2d Cir.1988). Thus, a certain tension between the exclusive jurisdiction vested in admiralty courts to determine the vessel owner's right to limited liability and saving to suitors clause has developed. *See Dammers,*

836 F.2d at 754; *Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir.1985) ("The conflict between the Limitation of Liability act . . . and the 'saving to suitors' clause . . . has been troublesome for the courts."). In resolving this tension, the "primary concern is to protect the shipowner's absolute right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum." *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992); *see also Gorman v. Cerasia*, 2 F.3d 519, 526 (3d Cir.1993) (in applying the saving to suitors clause, the district court must "ensure that the shipowner will not be exposed to competing claims to the limitation fund").

Courts have attempted to give effect to both the Limitation Act and the saving to suitors clause whenever possible, by identifying two sets of circumstances under which the damage claimants must be allowed to try liability and damages issues in a forum of their own choosing. The first circumstance arises where the limitation fund exceeds the aggregate amount of all the possible claims against the vessel owner. *See Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152-53, 77 S.Ct. 1269, 1272-73, 1 L.Ed.2d 1246 (1957) (allowing damage claimants to proceed against shipowner in state court where stipulations reduced total of all claims to an amount below limitation fund). In such a case, the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated. *Id.; see also S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 643 (6th Cir.1982) ("Where the limitation fund is sufficient to pay all potential claims . . . a *concursus* is unnecessary because the claimants need not compete among themselves for larger portions of a limited fund. This exception to the *concursus* proceeding protects the claimant's right to a jury trial in the forum of his choice without undermining the Limitation Act's policy of limiting

the shipowner's liability to the value of the vessel and its freight.").

The second circumstance exists where there is only one claimant. Because a major purpose of the *concursus* proceeding is to resolve *competing* claims to the limitation fund, the single claimant may try liability and damages issues in another forum by filing stipulations that protect the shipowner's right to have the admiralty court ultimately adjudicate its claim to limited liability. *See, e.g., Ex parte Green,* 286 U.S. 437, 438-40, 52 S.Ct. 602, 602-03, 76 L.Ed. 1212 (1932); *Langnes v. Green,* 282 U.S. 531, 540-44, 51 S.Ct. 243, 246-48, 75 L.Ed. 520 (1931). "Specifically, the claimant must waive any claim of res judicata relevant to the issue of limited liability based on any judgement obtained in the state court, and concede the shipowner's right to litigate all issues relating to limitation in the federal limitation proceeding." *Gorman v. Cerasia,* 2 F.3d 519, 524 (3d Cir.1993); *see also In re Midland Enter., Inc.* 886 F.2d 812, 814 (6th Cir.1989) (explaining that the single claimant must formally concede the district court's exclusive jurisdiction to determine limitation of liability issues, that the value of the vessel and freight will be the limit of the fund available if limitation is granted, and that no res judicata arguments will be made based upon any state court judgement); *In re Mucho K, Inc.* 578 F.2d 1156, 1158 (5th Cir.1978) (holding that "the claimant in a single claim situation after appropriate protective stipulations [may] proceed elsewhere reserving exclusive final determination of the right to limitation (and the amount of the fund) to the admiralty court") (quoting *Pershing Auto Rentals, Inc. v. Gaffney,* 279 F.2d 546, 550 (5th Cir. 1960).[5] If the state court

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5. In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

(or the law side of the federal court) holds the vessel owner liable for the accident and assesses damages exceeding the limitation fund, the parties must return to the admiralty court for a determination of the privity or knowledge issues. *See Texaco, Inc. v. Williams*, 47 F.3d 765, 767 (5th Cir.), *cert. denied*, — U.S. —, 116 S.Ct. 275, 133 L.Ed.2d 196 (1995); *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992) (explaining that "[t]he claimant must stipulate . . . that no judgement against the shipowner will be asserted to the extent it exceeds the value of the limitation fund"); *Avera v. Florida Towing Corp*, 322 F.2d 155, 159-60 (5th Cir.1963) (after a state court jury found the shipowner liable to the damage claimant, the parties returned to the admiralty court to determine whether any of the acts of negligence "which were submitted to and impliedly found by the state court jury" were committed without the privity or knowledge of the shipowner). If limitation is denied (e.g., because the vessel owner fails to establish a lack of "privity or knowledge"), the claimant may then enforce his or her state court judgement for damages exceeding the limitation fund. Accordingly, the shipowner's absolute right to claim limited liability, and to reserve the adjudication of that claim in the admiralty court, has been fully protected. *See Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992).

The instant case appears to present a "multiple-claims-inadequate-fund" situation. The "adequate fund" exception does not apply here, because the damage claimants each seek to recover amounts exceeding the value of the M/V Skyrider Express and its freight. Nor does the "single claimant" exception apply, because there are at least two separate claims for damages: the personal injury claim of Kathleen Carletta and the wrongful death claim of the estate of George Myers. In genuine "multiple-claims-inadequate-fund" cases, the courts have not allowed damage claimants to try liability and damages issues in

their chosen fora, even if they agree to return to the admiralty court to litigate the vessel owner's privity or knowledge. *See Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 549-50 (5th Cir.1960). This is because, without a *concursus* in the admiralty court, the claimants could "secure judgments in various courts that, in the aggregate, exceed the [limitation] fund." *Universal Towing Co. v. Barrale*, 595 F.2d 414, 418 (8th Cir.1979). Thus, the damage claimants in a true multiple-claims-inadequate-fund case may not proceed against the vessel owner except in the admiralty court.

In recent years, however, courts have allowed claimants to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case through appropriate stipulations, including stipulations that set the priority in which the multiple claims will be paid from the limitation fund. By entering such stipulations, the damage claimants effectively guarantee that the vessel owner will not be exposed to competing judgements in excess of the limitation fund. Without such competition for the limitation fund, a *concursus* is unnecessary, just as in a true single claimant case, and the claimants may litigate liability and damages issues in their chosen fora. *See Gorman v. Cerasia*, 2 F.3d 519, 526 (3d Cir.1993) ("[A]s long as the priority stipulations filed in the district court ensure that the shipowner will not be exposed to competing claims to the limited fund representing more than the value of his or her vessel, the district court may authorize the parties to proceed with the state court action."); *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1576 (5th Cir.1992) ("Multiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating as to the priority in which the claimants will receive satisfaction against the shipowner from the limited fund."); *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 756 (2d Cir.1988) (explaining that appropriate stipulations "allow claimants who might

not otherwise be entitled to do so to proceed with common law actions in other forums"); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir.1982) (explaining that a multiple claims situation no longer exists, and a *concursus* is unnecessary, where the claimants enter priority stipulations); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir.1979) (where two claimants stipulate the priority in which their claims will be paid from the limitation fund, the vessel owner is no longer subject to competing claims and therefore a *concursus* would serve no purpose); *In re Garvey Marine, Inc.* 909 F.Supp. 560, 565 (N.D.Ill.1995) ("The multiplicity of claims will not bar dissolution of the stay order if the claimants, by their stipulations, transform the multiple claims into a single claim for purposes of the exception."); *In re Mohawk Assocs. and Furlough, Inc.*, 897 F.Supp. 906, 911 (D.Md. 1995) (same).

III.

[3] Although no prior case in this Circuit has employed the foregoing stipulation method to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case, we follow the numerous decisions cited above in doing so today. As an initial matter, we note that the Supreme Court has approved the use of stipulations in other contexts to accomplish similar purposes. In *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957), the Court approved the use of stipulations by multiple claimants to reduce the aggregate amount of their claims to a level below the limitation fund. *See id.* at 149, 77 S.Ct. at 1270-71. The stipulations thus eliminated the need for a *concursus*, because the vessel owner no longer faced the prospect of excess liability. *See id.* at 152, 77 S.Ct. at 1272. Significantly, in allowing the state court action against the vessel owner to proceed, the court explicitly rejected the argument that the Limitation Act protects the ves-

sel owner against a multiplicity of suits. *See id.* at 153-54, 77 S.Ct. at 1273. Because of the saving to suitors clause, the Court reasoned, the shipowner may not force the damage claimants to litigate their claims in the admiralty court unless a *concursus* is *necessary* to protect the vessel owner's claim of limited liability under the Act. *See id.* at 152-54, 77 S.Ct. at 1272-73.

The *Lake Tankers* case thus establishes that the damage claimants in a multiple-claims-inadequate-fund case may file appropriate stipulations to create an adequate fund case, thereby eliminating the need for a *concursus.* If the damage claimants can make a *concursus* unnecessary by stipulating to the amount of their claims, it follows that they also should be able to make a *concursus* unnecessary by transforming their multiple claims into the functional equivalent of a single claim. This procedure protects the vessel owner's rights under the Limitation Act, while allowing the damage claimants to pursue their common law remedies—a result consistent with the mandate of the saving to suitors clause. *Cf. Dammers,* 836 F.2d at 760 (explaining that "admiralty courts must strive whenever possible to promote the policies underlying both [the Limitation Act and the saving to suitors clause]").

The decision of the former Fifth Circuit in *Pershing Auto Rentals, Inc. v. Gaffney,* 279 F.2d 546 (5th Cir.1960) does not preclude our holding that multiple claimants may create the equivalent of a single claim by entering appropriate stipulations. In that case, four injured claimants sought damages against the vessel owner totalling $558,000, but the amount of the limitation fund was only $500. In an attempt to proceed against the vessel owner and other defendants in state court, two out of the four claimants offered to file protective stipulations. The district court modified its injunction to permit these two claimants to pursue their state court actions, even though the other two claimants, who did not offer to file protective stipulations, sought

to recover amounts in excess of the limitation fund. The Fifth Circuit reversed, explaining that the stipulations were inadequate, *inter alia*, because only two out of the four claimants agreed to sign them. *See id.* at 549. After reaching this holding, the *Pershing Auto Rentals* opinion implies that the damage claims in a multiple-claims-inadequate-fund case must *always* be adjudicated in the admiralty court. *See id.* at 549-52. However, we do not believe that such an implication from *Pershing Auto Rentals* is controlling here. In *Pershing Auto Rentals*, only two out of the four damage claimants agreed to enter protective stipulations; thus, a *concursus* was still necessary to ensure that the vessel owner would not be exposed to competing judgments that could exhaust the limitation fund. Unlike the case at bar, the court was not presented with stipulations which might have transformed the multiple claims into the equivalent of a single claim, thereby eliminating the competition among claimants for the limitation fund.[6]

Finally we are persuaded by the weight of authority in accepting the argument that multiple claimants may invoke the single claimant exception through appropriate stipulations. Every circuit court of appeals that has expressly addressed this argument has accepted it. See *Gorman v. Cerasia*, 2 F.3d 519, 526 (3d Cir.1993); *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1576, (5th Cir.1992); *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 756 (2d Cir.1988); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir.1982); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir.1979).

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6. The new Fifth Circuit has also distinguished *Pershing Auto Rentals* on this basis. *See Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 4 F.3d 401, 405 n. 7 (5th Cir.1993).

IV.

With these legal principles in mind, we now address the adequacy of the stipulations filed by appellees, the damage claimants, and approved by the district court in this case. First, we address whether the stipulations have in fact created the functional equivalent of a single claim situation, or whether a multiple claims situation still exists. Only if the stipulations produce the functional equivalent of a single claim may the state court action against BEC proceed. Second, we address whether the stipulations are otherwise sufficient to protect BEC's right to claim limited liability.

A.

Have the Stipulations Created the Equivalent of a Single Claim?

[4] There is no question that the personal injury claim asserted by Kathleen Carletta and the wrongful death claim asserted by the estate of George Myers are separate claims that would ordinarily require a *concursus.* In addition, "[i]t is . . . well settled that the potential for claims for attorneys' fees or costs against a shipowner by a claimant or a third party creates a multiple claimant situation necessitating a *concursus.*" *Dammers* 836 F.2d at 756; *see also Gorman,* 2 F.3d at 528 (same); *S & E Shipping,* 678 F.2d at 645-46 (same); *Universal Towing,* 595 F.2d at 419 (same). However, all of these problems are cured by paragraphs five and six of the amended stipulations, which provide that any claims for attorneys' fees or costs have first priority, that the claim of Myers' estate has second priority, and that Carletta's claim has last priority.

To resolve this case properly, however, we must address two other sets of potential claims: first, claims that might be

asserted by the four minor children surviving Myers; and second, indemnity or contribution claims that might be asserted by BEC's state court co-defendants.

1. Potential Claims by Myers' Surviving Minor Children

[5] The deceased, George Myers, is survived by his mother, Elnora Myers, and his four minor children: Shante Denise Myers, Tiffany Elnora Margaret Myers, George Edward Myers, Jr., and Julian Caesar Myers. The Surrogate's Court for New York County, New York appointed Elnora Myers as personal representative of her son's estate. Acting in this capacity, Elnora Myers executed the amended stipulations at issue in the instant limitation action, and she is the plaintiff in the suit against BEC (and others) in Florida state court for the wrongful death of George Myers.

BEC argues that the personal representative's signature on the amended stipulations is insufficient to protect its rights under the Limitation Act. According the BEC, this is a multiple claims case because Myers' four minor children have not themselves signed any protective stipulations. We disagree. There is only a single claim arising from Myers' death, and it belongs to the personal representative of his estate. The beneficiaries of the estate, including the minor children, are not authorized to bring independent suits for their individual damages; rather, they must share in the single judgment, if any, obtained by the personal representative. This is true under the general maritime law, Florida law, and New York law. *See* Fl.Stat. § 768.20 (West 1986) ("The [wrongful death] action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death."); N.Y Estates, Powers and Trusts Law § 5-4.1 (McKinney 1981) ("The personal representative . . . of a decedent who is survived

by distributees may maintain an action to recover damages for a wrongful act, neglect of default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued."); *see also Futch v. Midland Enter., Inc.*, 471 F.2d 1195, 1195-96 (5th Cir.1973) (holding that the only person who can bring a cause of action for wrongful death under general maritime law is the personal representative of the decedent); *Funchess v. Gulf Stream Apartments*, 611 So.2d 43, 45 (Fla.App. 4 Dist.1992) ("By requiring the personal representative to bring a single action, the [Florida wrongful death] statute eliminates the potential for competing beneficiaries to race to judgement, preferential treatment of one or more beneficiaries in the disposition of their claims and, most significantly, multiple claims and lawsuits against the wrongdoer."); *Mingone v. State*, 100 A.D.2d 897, 474 N.Y.S.2d 557 (2d Dept.1984) (under New York law, holding that "[a] personal representative . . . is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent and a wrongful death action to recover the damages sustained by the decedent's distributees on account of his or her death"). Because the result is the same under the general maritime law, Florida law, and New York law, we do not decide which jurisdiction's wrongful death law applies in this case. Rather, we merely conclude that, for purposes of the Limitation Act, the existence of minor children does not transform the wrongful death cause of action in the case from a single claim situation to one involving multiple claims. *Accord In re Midland Enter., Inc.*, 886 F.2d 812, 815-16 (6th Cir.1989) holding that a wrongful death action involving a widow and two children is a single claim for purposes of the Limitation Act, because only the personal representative of the estate may bring the claim); *In re Mucho K, Inc.*, 578 F.2d 1156, 1157-58 (5th Cir.1978) (same).

2. Potential Third Party Claims for Indemnity or Contribution

[6] In addition to suing BEC in the state court action, appellees have named several other parties as defendants. Because these third party co-defendants could assert cross claims against BEC for indemnification or contribution, a question under the Limitation Act arises. Does the possibility of such third party claims present a multiple claimant situation necessitating a *concursus?*

There appears to be a split of authority among the federal appellate courts on this issue. In *Universal Towing Co. v. Barrale,* 595 F.2d 414 (8th Cir.1979), the court held that an indemnity claim against the shipowner does not create a multiple claim situation, because "the indemnity claim is merely derivative of the one presented by the claimant." *Id.* at 419. In other words, "[t]he third party . . . can only recover what the claimant was entitled to recover from the owner, which cannot exceed the owner's statutory limit." *Id.* In *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.,* 678 F.2d 636 (6th Cir.1982), the Sixth Circuit followed the reasoning of the Eighth Circuit, and held that indemnity and contribution claims of joint tortfeasors against the shipowner do not create a multiple claims situation, because such claims are "derived from and dependent upon the primary claim against the shipowner." *Id.* at 645.[7]

More recent opinions, however, have disagreed with the analysis of the Eighth and Sixth Circuits. In *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,* 836 F.2d 750 (2d Cir.1988), the Second Circuit held that "the reasonable prospect of claims for indemnification should constitute a multiple

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7. In a separate opinion, Judge Kennedy disagreed with the majority's holding that indemnity and contribution claims from joint tortfeasors are merely derivative of the primary claim against the shipowner. *See id.* at 646-49.

claimant situation necessitating a *concursus*." *Id.* at 757. Following *Dammers*, the Third Circuit recently explained why a *concursus* is necessary when there are potential third party claims for indemnification or contribution:

> A multiple claimant situation could arise, for example, if the plaintiffs seek to enforce a state court judgment against the shipowner up to the value of the limitation fund and then seek to recover the remaining amount of the judgment against the shipowner's co-defendants. If the defendants do not sign protective stipulations with the admiralty court, they would not be foreclosed from recovering against the shipowner for contribution, even though his or her liability (assuming a finding of no privity or knowledge) has already been exhausted. It is precisely this kind of competition for the limitation fund that the Act was designed to avoid.

Gorman v. Cerasia, 2 F.3d 519, 527 (3d Cir. 1993).[8] The Fifth Circuit has followed the analysis of the Second and Third Circuits on this issue. *See Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 675 (5th Cir. 1996) (explaining that potential claims for contribution or indemnity asserted by the ves-

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8. *Gorman* provided a "practical illustration of why a co-defendant's contribution claim creates a multiple claimant situation" by quoting from Judge Kennedy's concurring opinion in *S & E Shipping*. *See Gorman*, 2 F.3d at 527 n. 8. We do the same:

> The [plaintiffs] could win a large judgment against [the shipowner and its co-defendant] jointly in the state court, say $1,000,000. [The co-defendant] could also win a judgment in state court entitling it to contribution from [the shipowner] for anything it pays the [plaintiffs] in excess of one-half the judgment, or $500,000. Because of the stipulation they have filed with the District court, the [plaintiffs] could collect no more from [the shipowner] than the value of the limitation fund as determined by the District Court. If the fund contains only

sel owner's co-defendants must be considered separately in assessing whether a *concursus* in the admiralty court is required); *In re Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir.) (per curiam) (same), *cert. denied sub nom. Jarreau v. Post Arthur Towing Co.*, ——U.S.——, 116 S.Ct. 87, 133 L.Ed.2d 44 (1995).

We find the more recent case law more persuasive. Therefore, to determine whether a multiple-claims-inadequate-fund situation exists, potential claims for indemnity or contribution from the vessel owner's co-defendants must be separately considered. In this case, therefore, we hold that the possibility of claims from BEC's state court co-defendants creates a multiple claims situation.

[7] None of BEC's state court co-defendants has entered stipulations protecting BEC's rights under the Limitation Act. The new Fifth Circuit has suggested that *all* potential claimants against the vessel owner, including third parties who might have contribution or indemnity claims, must sign protective stipulations in order for the injured claimants to proceed outside of

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> $250,000 . . . then [the co-defendant], jointly and severally liable, would be obligated to pay [the plaintiffs] the unpaid balance of the judgment, or $750,000. Under its right to contribution [the co-defendant] would be entitled to recover from [the shipowner] any excess over $500,000 that it paid the [plaintiffs], or $250,000. Since [the co-defendant] did not stipulate that any state court judgment in its favor would not be res judicata on the limitation question, it would then have a $250,000 claim against [the shipowner] that was not subject to limitation. The result would be that [the shipowner] would have to pay a total of $500,000 on account of the injury . . . when under the Limited Liability Act it should only have been liable for the value of the vessel, or $250,000. This is a clear violation of the Limited Liability Act.

S & E Shipping, 678 F.2d at 647 (opinion of Kennedy, J.).

the limitation action. *See Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 675 (5th Cir. 1996) (holding that all claimants, including co-defendants who might assert claims for contribution or indemnity, must enter protective stipulations in order for the injunction against state court proceedings to be lifted); *In re Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir.) (per curiam) ("When the aggregate of the damages being sought by all claimants exceeds the value of the concursus, actions in state court cannot proceed unless *all* claimants enter into a stipulation that adequately protects the shipowner . . . . [A] 'claimant' in this context includes a codefendant who is asserting a cross claim for indemnification, costs, and attorneys' fees."), *cert. denied sub nom. Jarreau v. Port Arthur Towing Co.*, —U.S.—, 116 S.Ct. 87, 133 L.Ed.2d 44 (1995). The basis for this suggestion (that all potential claimants, including co-defendants, must enter stipulations) is the lack of assurance that the vessel owner's right to claim limited liability will be fully protected.

However, the Second Circuit in *Dammers* has held that the vessel owner can be protected from excess liability at the hands of third parties even if those third parties themselves do not enter any protective stipulations. *See id.* at 758-59. In *Dammers*, the damage claimants entered the following stipulation:

> In the event there is a judgment or recovery in *any* State Court *actions* in excess of [the limitation fund] whether against the [vessel owners], or any other liable parties who may cross-claim or claim over against the [vessel owners], in no event will [the damage claimants] seek to enforce said excess judgment or recovery insofar as same may expose [the vessel owners] to liability in excess of [the limitation fund] pending the adjudication of Limitation of Liability in the District Court.

Id. at 759. Although none of the vessel owners' co-defendants in *Dammers* entered stipulations, the Second Circuit held that the above-quoted stipulation was sufficient to protect the owners from excess liability at the hands of third parties.[9] Thus, the damage claimants were allowed to proceed against the vessel owners in state court.

[8] Here, appellees have attempted to cure the problem presented by the existence of BEC's co-defendants by entering a stipulation similar to the one approved in *Dammers.* Appellees have stipulated as follows:

> 4. That the Respondent/Claimants will not seek to enforce any judgment rendered in any state court, whether against the Petitioner or another person or entity that would be entitled to seek indemnity or contribution from the Petitioner, by way of cross-claim or otherwise, that would expose the Petition [sic] to liability in excess of $40,090.00, until such time as this Court has adjudicated the Petitioner's right to limit that liability.

In our view, this stipulation cures the "multiple claims" problem presented by BEC's state court co-defendants.[10] These third parties' claims against BEC are based solely on their liability to appellees. Appellees have promised not to enforce any state court judgment (which would expose BEC to liability in excess of the limit) against *any* party, including BEC's co-defendants, until

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9. Although the new Fifth Circuit has suggested that all of the vessel owner's co-defendants must themselves enter stipulations, *see supra,* no Fifth Circuit cases have actually criticized the stipulation approved in *Dammers.* Indeed, in *In re Two "R" Drilling Co.,* 943 F.2d 576, 578 (5th Cir.1991), the new Fifth Circuit upheld a stipulation that mirrors the stipulation approved in *Dammers.*

10. However, further modifications of this stipulation, as discussed in Part IV B of this opinion, may be necessary to protect the vessel owner.

BEC's right to limitation is adjudicated in the admiralty court. By giving up such claims unless and until limitation is denied, appellees have eliminated the possibility that competing claims will exhaust the limitation fund before the admiralty court has the opportunity to determine whether to grant limited liability to BEC.

For all of the foregoing reasons, we therefore conclude that appellees' stipulations have converted this case into the functional equivalent of a single claim case.

B.

Content of the Stipulations

Even in a single claimant case, the stipulations must fully protect the vessel owner's rights under the Limitation Act. In this case, we have three specific concerns with respect to the amended stipulations, which we direct the district court to evaluate on remand.

[9] First, the stipulations must protect the vessel owner's right to litigate its claim to limited liability exclusively in the admiralty court. In paragraphs one and two of the amended stipulations, appellees have conceded the admiralty court's exclusive jurisdiction over all limitation issues, and in paragraph three, appellees have promised not to seek a determination of those limitation issues in their state court action. Moreover, appellees have consented "to waive any res judicata effect the decisions, rulings or judgments of any state court might have on those [limitation] issues." Our concern is this: in order to protect the vessel owner's statutory rights, this latter stipulation must not be interpreted too narrowly. The damage claimants must agree not only to waive a "res judicata" defense, but must also agree to waive the related defense of issue preclusion with respect to

all matters reserved exclusively for determination by the admiralty court. For example, suppose that the state court holds that a single negligent act attributable to BEC caused the accident. The state court's determination that BEC is liable for the accident would be binding in the limitation proceeding, and the admiralty court would determine only whether BEC is entitled to limit that liability. To receive limitation, BEC would have to prove that it lacked privity or knowledge of the negligent act. In litigating this question of BEC's privity or knowledge, appellees may not assert any defense based on issue preclusion. Thus, it is possible that several factual issues that were determined by the state court in resolving the negligence question would have to be relitigated in the admiralty court in resolving the privity or knowledge question. On remand, the district court should determine whether appellees intended to waive the defense of issue preclusion with respect to all limitation issues. If appellees' waiver was not intended to be so broad, then the district court should reinstate the injunction against appellees' state court action. The district court should also consider whether the language of the amended stipulations needs to be clarified in light of the concerns we have identified in this paragraph.

[10] Second, the stipulations must protect the vessel owner from having to pay damages in excess of the limitation fund, unless and until the admiralty court denies limited liability. In paragraph four of the amended stipulations, appellees have promised not to enforce any judgement in excess of the limitation fund against BEC, or against any co-liable party, "until such time as [the admiralty court] has adjudicated the Petitioner's right to limit that liability." We believe that this stipulation needs clarification, because it does not spell out what happens in the event that BEC's limitation petition is granted. Obviously, if limitation is granted, it would violate the spirit of the Limitation Act for appellees to enforce any judgment that would require

BEC to pay damages in excess of the limitation fund. On remand, the stipulation should be clarified accordingly.

[11] Finally, the stipulations must protect the vessel owner from litigation by the damage claimants in *any* forum outside the limitation proceeding. Here, the stipulations refer only to "state court." Because damage claims also may be heard in other fora (e.g., the law side of the federal court), the appellees' stipulations should be amended accordingly.

V.

For the foregoing reasons, we VACATE the order of the district court lifting the injunction against the state court action, and REMAND for further proceedings consistent with this opinion.[11] On remand, if the concerns we have identified in Part IV.B. of this opinion are satisfied, the district court may permit the state court action against BEC to proceed.

VACATED AND REMANDED.

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11. We note that the concerns prompting this remand are relatively minor and that they probably can be remedied on remand.

APPENDIX B

FILED
NOV 30, 1994 3:58 PM
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MATTER OF PETITION OF BEISWENGER ENTERPRISES CORPORATION,	§	
Plaintiff,	§	CIVIL ACTION
v.	§	FILE NO.
KATHLEEN CARLETTA, and the estate and minor children of GEORGE MYERS,	§	91-149-CIV-T-17(C)
Defendants.	§	

ORDER ON RESPONDENT/CLAIMANTS' MOTION TO STAY LIMITATION OF LIABILITY ACTION AND TO LIFT INJUNCTION RESTRAINING ACTIONS AGAINST PETITIONER/VESSEL OWNER

This cause is before the Court on Respondent/Claimants' (Defendants') Motion to Stay Limitation of Liability Action and Lift Injunction Restraining Actions Against Petitioner/Vessel Owner (Dkt. Nos. 66-1 and 66-2), and Petitioner's Response (Docket 72).

POSTURE OF THE CASE

George Myers was killed and Defendant Kathleen Carletta was injured in a parasailing accident off of Clearwater Beach on December 4, 1990. Involved in the accident was the M/V SKYRIDER EXPRESS, a motor vessel owned and operated by Plaintiff from a berth in Clearwater, Florida.

On February 5, 1991, Plaintiff petitioned this Court for exoneration or limitation of its liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* An injunction was entered on March 15, 1991 restraining the filing and prosecution of any suits against Plaintiff until a hearing and determination could be made on the limitation of liability issue.

On April 12, 1991, Defendant Carletta filed a claim for injuries incurred as a result of the parasailing accident in the amount of $100,000.00. The Estate of George Myers, Pauline Walls, as next friend and mother of Shante Myers also filed a claim against the Plaintiff. The deceased, George Myers, has four natural children known as Shante Myers, Julian Myers, George Edward Myers, Jr., and Tiffany Carter. The Estate of George Myers and the two minor children, Shante Myers and Julian Myers, claimed $1,000,000.00 in damages each against the Plaintiff. Defendants/Claimants allege liability on the part of Petitioner/Plaintiff based on a theory of negligence.

Defendants/Claimants also, in July 1992, filed an action for personal injury and wrongful death in state court against Parasailing Enterprises, Inc. and Controlled Parasailing Corporation of America, the manufacturer and seller of the parasailing equipment, Roy F. Beiswenger, the operator of the M/V. SKYRIDER EXPRESS at the time of the accident, and William J. Beiswenger, the parasailing instructor and trainer.

On September 14, 1994, Defendants/Claimants filed a Motion to Stay the Limitation of Liability Action and lift the injunction restraining actions against the Petitioner/Plaintiff in state court. Unilateral pretrial statements were filed by the parties. Oral argument was heard on that Motion by Magistrate Judge Elizabeth Jenkins at the pretrial conference, who recommended that the Motion be denied without prejudice.

Defendants/Claimants filed a timely objection to the recommendation of the Magistrate on October 6, 1994. Plaintiff has not responded to that objection.

APPLICABLE LAW

With respect to this pending Motion the parties agree upon the content of the law. *Petitioner's Response to Claimants' Motion to Stay* at 9 and *Respondent Claimants' Motion to Stay Limitation of Liability Action* at 4. Plaintiff is entitled to, and admiralty court has exclusive jurisdiction over, limitation of liability proceedings. However, there are exceptions to this. If the limitation fund is exceeded by the aggregate amount of claims, the district court must allow the claimants to proceed in other forums. While a stay on any other proceedings is generally appropriate, the district court must lift a stay against them when the claimant or claimants concede the admiralty court's exclusive jurisdiction to determine all issues regarding limitation of liability. *Gorman v. Cerasia*, 2 F.3d 519 (3d Cir. 1993). Further, as long as the admiralty court can effectively ensure that a shipowner will not face liability in excess of the limitation fund, it must take all steps necessary to assure that claimants are allowed to pursue their common law remedies. *In re Complaint of Dammers & Vanderheide & Scheepraart Maats Christina B.V.*, 835 F.2d 750 (2nd Cir 1988).

To ensure the preservation of the admiralty jurisdiction while attempting to exercise the process to reach their other potential remedies, all claimants must make certain stipulations to the district court. In a case with multiple claimants, such as this one, in order to perfect their right to proceed in state court, claimants must agree that: (1) the petitioner (Plaintiff) has the exclusive right to litigate the limitation of liability issue in federal court; (2) that the petitioner (Plaintiff) has the right to have the value of the vessel and its cargo determined in federal court; (3) that any res judicata effect the state court judgement might have on these issues is waived; (4) that no state court judgment which would expose the petitioner to liability in excess of the value of its vessel and cargo will be enforced until the federal court has determined the limitation of liability issues; and (5) that if the petitioner is found to have limited liability the available fund will be disbursed to the multiple claimants in a specified fashion or priority. *See Gorman,* 2 F.3d at 524. *See also Dammers* 836 F.2d at 759.

ISSUES

Given the parties' agreement on the applicable law, the major remaining issue with respect to this pending Motion is the sufficiency of the stipulations made by the Defendant/Claimants. The report by the Magistrate Judge indicated that the initial stipulations of Defendant/Claimants were deficient in two respects; (1) that they did not limit liability to the amount of the limitation fund, and; (2) that they did not agree to priority between the various claimants.

Defendants/Claimants, subsequent to the Magistrate Judge's Report and Recommendations, and along with their objections, filed Amended Stipulations to cure the deficiencies thus identified. Paragraph 4 of the Amended Stipulations indi-

cates that Defendants/Claimants will not seek to expose the Petitioner/Plaintiff to liability in excess of the limitation fund until such time as the Court has adjudicated his right to limit liability. Paragraphs 5 and 6 set the priorities of the claimants in the event of any payment of claims.

Petitioner/Plaintiff has filed no objection or response to the Amended Stipulations. The Court concludes that the stipulations, as amended, are sufficient to meet the requirements that both parties agree constitute the applicable law.

The Magistrate Judge also indicated a concern with the timeliness of the Motion. Lifting a stay against state court proceedings on the eve of trial in the limitation action may well cause prejudice to the petitioner, and so should be denied. *In the Matter of DFDS Seaways (Bahamas) Ltd.*, 1988 WL 61944 (S.D.N.Y.), 1989 A.M.C. 935 (S.D.N.Y. 1988). At the time of the pretrial conference, this action was on the trial calendar and that was a reasonable concern. This case was not reached on that calendar, and this Court does not know when a Visiting Judge will be available for nonjury cases. This is a three year old case, and the Court must dispose of it. Accordingly, *Respondent Claimants' Motion to Stay Limitation of Liability Action and to Lift Injunction Restraining Actions Against Petitioners* (Dkt. 66) is granted. Petitioner shall advise the Court within ten days whether Petitioner objects to the administrative closure of this case while the state court proceedings take place.

DONE AND ORDERED in Chambers, in Tampa, Florida, on this 30th day of November 1994.

/s/ Elizabeth A. Kovachevich
United States District Judge

Copies to: All parties and counsel of record

APPENDIX C

FILED
SEPT. 22, 1994 4:04 PM
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MATTER OF PETITION OF BEISWENGER ENTERPRISES CORPORATION,	§	
Petitioner,	§	Case No.
v.	§	91-149-Civ-T-17C
KATHLEEN CARLETTA, and the Estate and minor children of GEORGE MYERS,	§	
Respondents.	§	

REPORT AND RECOMMENDATION

This comes on for consideration of Respondent/Claimants' Motion to Stay Limitation of Liability Action and to Lift Injunction Restraining Actions Against Petitioner/Vessel Owner (Dkt.66) and Petitioner's Response (Dkt.72).[1] Oral argument was heard on September 19, 1994.

1. This matter has been referred to the undersigned by the district court for a report and recommendation. *See* Local Rules 6.01(b) and 6.01(c), M.D. Fla.

On December 4, 1990, George Edward Myers was killed and Kathleen Carletta was injured in a parasailing accident off Clearwater Beach, Florida. The motor vessel involved in the incident was the "Skyrider Express" which is owned by the petitioner corporation.

On February 5, 1991, plaintiff petitioned this court for exoneration or limitation of its liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* An injunction was entered on March 15, 1991 restraining the filing and prosecution of any suits against petitioner until a hearing and determination could be made on the limitation of liability issue.

On April 12, 1991, Carletta filed a claim for injuries incurred as a result of the parasailing accident in the amount of $100,000.00. The Estate of George Myers, Pauline Walls, as next friend and mother of Shante Myers, and Yolanda Williams, as next friend and mother of Julian Myers also filed a claim against the petitioner. The deceased, George Myers, had four natural children known as Shante Myers, Julian Myers, George Edward Myers, Jr., and Tiffany Carter.[2] The Estate of George Myers and the two minor children, Shante Myers and Julian Myers, claimed $1,000,000.00 in damages each against the petitioner. The claimants allege liability on the part of petitioner based on a theory of negligence.

In July 1992 claimants filed an action for personal injury and wrongful death in state court against Parasailing Enterprises, Inc. and Controlled Parasailing Corporation of America, the manufacturer and seller of the parasailing equipment, Roy F.

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2. The parties agree that the children of George Myers are derivative claimants of the estate. However, Dennis Lopez, P.A., filed a notice of appearance on behalf of Shantee Myers, George E. Myers., Jr. and Julian C. Myers on September 13, 1994.

Beiswenger, the operator of the M/V Skyrider Express at the time of the accident, and William J. Beiswenger, the parasailing instructor and trainer. This case has not been set for trial, according to claimants

On September 14, 1994, claimants filed a motion to stay the limitation of liability action and lift the injunction restraining actions against the petitioner in state court. This case is on the visiting judge calendar for October 3, 1994. Claimants seek to bring all of their claims, including those against the petitioner, together in one state court action in which they are entitled to a jury trial.

An inherent conflict in admiralty law concerns the "apparently exclusive jurisdiction vested in admiralty courts by the Limitation of Liability Act versus the presumption in favor of jury trials and common law remedies embodied in the 'savings to suitors' clause of 28 U.S.C. § 1333 (1982)." *In re Complaint of Dammers & Vanderheide & Scheepraart Maats Christina B.V.*, 836 F.2d 720 754 (2d Cir.1988).

Historically, courts have recognized two exceptions to an admiralty court's exclusive jurisdiction over limitation proceedings. First, if the limitation fund (the value of the vessel and its cargo) exceeds the aggregate amount of the claims, the district court must allow the claimants to proceed in other forums. Under these circumstances "a concursus is unnecessary because the claimants need not compete among themselves for larger portions of a limited fund." *Id.* at 755. *See also Gorman v. Cerasia*, 2 F.3d 519, 524 (ed Cir.1993). Second, a district court must lift the stay against other proceedings when a single claimant seeking an amount in excess of the limitation fund concedes the admiralty court's exclusive jurisdiction to determine all issues regarding limitation of liability. *Id.*

As long as the admiralty court can effectively ensure that a shipowner will not face liability in excess of the limitation fund, it must take all steps necessary to assure that claimants are allowed to pursue their common law remedies in accordance with the 'savings to suitors' clause. *Dammers*, 836 F.2d at 759. *See also Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957) (when shipowner's right to limit liability can be preserved, claimant's right to pursue common law remedies and obtain a jury trial prevail). However, a court must accede to the claimants' desire to proceed first in state court only when stipulations fully protect the shipowner's right to limit liability. *Dammers*, 836 F.2d at 759.

It is undisputed that this case involves more than one claimant and the amount of the claims are greatly in excess of the limitation fund which is $40,090.00. A third exception has been recognized for multiple claimant, inadequate fund situations. *See Gorman*, 2 F.3d at 524-26; *Odeco Oil and Gas Co., Drilling Div. v. Bonnette*, 4 F.3d 401 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1370 (1994). Multiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating "to the priority in which the claimants will receive satisfaction against the shipowner from the limited fund." *Gorman*, 2 F.3d at 525 (citation omitted). This protects the shipowner from being exposed to competing claims in excess of the limitation fund. In *Gorman* the court found that the stipulations preserved the shipowner's right to litigate all issues involving limitation of liability in the limitation court free of any claims of res judicata.

The stipulations that multiple claimants to a limited fund must agree to in order to perfect their right to proceed in state court must include an agreement that: (1) that the petitioner has the exclusive right to litigate the limitation of liability issue in federal court; (2) that the petitioner has the right to have the

value of the vessel and its cargo determined in federal court; (3)that any res judicata effect the state court judgment might have on these issues is waived; (4) that no state court judgment which would expose the petitioner to liability in excess of the value of its vessel and cargo will be enforced until the federal court has determined the limitation of liability issues; and (5) that if the petitioner is found to have limited liability the available fund will be disbursed to the multiple claimants in a specified fashion or priority. *See Gorman,* 2 F.3d at 524. *See also Dammers,* 836 F.2d at 759.

The claimants have submitted a stipulation in support of their motion. However, this stipulation is deficient in at least two respects. First, the claimants do not limit liability to the amount of the limitation fund. Paragraph 4 of the stipulation states:

> That the Respondent/Claimants will not seek to enforce any judgment rendered in any state court, whether against the Petitioner or another person or entity that would be entitled to seek indemnity or contribution from the Petitioner, that would expose the Petitioner to liability *in excess of the claimed limit of its liability,* until such time as this Court has adjudicated the Petitioner's right to limit that liability. (emphasis added)

The stipulation is insufficient and does not meet the requirements of *Dammers* because it does not accept the established fund in the limitation case as the absolute maximum recovery until petitioner's right to limitation is adjudicated by the admiralty court. *See Dammers,* 836 F.2d at 759. The amount of the limitation fund is $40,090.00. Claimants have not ensured, through their stipulation, that petitioner will not be subject to liability in excess of the limitation fund pending adjudication of petitioner's right to limitation.

Second, the claimants do not agree to priority between the two distinct claimants Carletta and the Estate of George Myers. Absent a stipulation specifying the priority of Carletta's claim as compared to that of Myers estate, the district court may not lift the stay against the state court proceedings. *See Gorman,* 2 F.3d at 526. Claimants wrongly seek to rely on an award of damages in state court to determine their pro rate share. Paragraph 5 and 6 of the stipulation provide:

> 5. That, in the event this Court determines that the Petitioner is entitled to limit its liability, the Respondent/ Claimants agree that any claim based upon fees and/or costs awarded against the Petitioner and in favor of any party in any state court proceeding will have first priority against the available fund.
>
> 6. That, in the event this Court determine that the Petitioner is entitled tc limit its liability, the Respondent/ Claimants agree that, following payment of the claims, if any, described in paragraph 5 above, the remaining funds available will be divided on the same pro-rata basis as damages are awarded in the state court action.

Allowing the state court to determine the "concursus" as suggested by claimants, would abridge the right of the petitioner to a determination by the admiralty court. *See id.* at 756. Concursus is a function of the admiralty court where it determines, without a jury, "whether there was negligence; if there was negligence, whether it was without the privity and knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed." *Dammers,* 836 F.2d at 755 (citation omitted).

Claimants have not made the stipulations required to proceed in state court against the petitioner. Until claimants stipu-

late that they will not attempt to recover by the state court action an amount in excess of the limitation fund established inthis court, pending a determination of the limitation issue by this court,[3] they are not entitled to proceed in state court and have this action abated. Moreover, the claimants must stipulate to the priority among the claims.[4]

There is also an issue as to the timeliness of the motion. Claimants filed the motion to stay and lift the injunction on September 14, 1994, less than one month before the scheduled trial date in this action. At least one court has noted that lifting a stay against state court proceedings on the eve of trial in the limitation action should be denied because of the prejudice it would cause to petitioner. *In the Matter of DFDS Seaways (Bahamas) Ltd.*, 1988 WL 61944 (S.D.N.Y.), 1989 A.M.C. 935 (S.D.N.Y. 1988). The court also noted the absence of all of the claimants' signatures on the required stipulations. *Id.* at *6, Similarly, the stipulation in the instant case was not signed personally by any of the claimants. However, in the event that this action does not proceed to trial in October, it may be appropriate for claimants to renew their motion if the deficiencies in the stipulation are corrected.

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3. Although petitioner suggests that claimants must stipulate that it will agree to the limitation fund as a cap on recovery before the stay can be lifted, claimants need only concede the petitioner's right to have that matter adjudicated exclusively in the admiralty court. *See Dammers*, 836 F.2d at 768.

4. Although not raised by either party, another concern of this court is how the stipulation protects the shipowner from liability claims which exceed the limitation fund from prospective claimants not parties to the limitation proceedings, ie. the defendants in the state court action. The *Odeco* Court addressed similar concerns and vacated the district court's stay of the limitation proceeding in order for the district court to consider the implications of possible cross claims against petitioner by the defendants in state court action. *Odeco*, 4 F.3d at 405.

It is therefore RECOMMENDED that:

1) Respondent/Claimants' Motion to Stay Limitation of Liability Action and to Lift Injunction Restraining Actions Against Petitioner/Vessel Owner (Dkt.66) be DENIED WITHOUT PREJUDICE.

/s/ Elizabeth A. Jenkins
ELIZBETH A. JENKINS
United States Magistrate Judge

Dated: September 22, 1994

NOTICE TO PARTIES

Failure to file written objections to the report and recommendation within ten (10) days from the date of its service shall bar an aggrieved party from attacking such report and recommendation before the assigned United States District Judge. 28 U.S.C. §636 (b) (1) (B), Rule 6.02, M.D. Fla.

APPENDIX D

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JAN 08 1997
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 95-2272

IN THE MATTER OF PETITION OF,
BEISWENGER ENTERPRISES CORP.,
Plaintiff-Appellant,

versus

KATHLEEN CARLETTA, PAULINE WALLS,
SHANTE MYERS, YOLANDA WILLIAMS,
JULIAN MYERS, ESTATE OF GEORGE MYERS,
GEORGE E. MYERS, JR.,
Claimants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19____, F.2d____).
Before: ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/illegible
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)